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IN THE
Supreme Court of the United States

OCTOBER TERM, 1980

GARY E. WIDMAR, et al.,
Petitioners,

v.

CLARK VINCENT, et al.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA")

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The undersigned, as counsel for the National Jewish Commission on Law and Public Affairs ("COLPA"), respectfully move this Court for leave to file the accompanying brief *amicus curiae* in support of the position of respondents that the decision below should be affirmed.

Consent to file this brief has been sought from the parties. Counsel for respondents consented to the filing of this brief, but counsel for petitioners have refused to consent on the ground that it is their general policy not to consent to the filing of *amicus* briefs, whether they be

favorable to or contrary to their position. It is therefore necessary to request leave of Court to file the attached brief, pursuant to Rule 42.

COLPA is a voluntary, not-for-profit corporation of attorneys and social scientists of the Jewish faith, dedicated to combatting all forms of religious prejudice and discrimination and representing the position of the Orthodox Jewish community in matters of public affairs. Since its organization in 1966, COLPA has filed *amicus* briefs before this Court in numerous cases involving the Free Exercise and Establishment Clauses of the First Amendment. *See, e.g., Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63 (1977); *Parker Seal Co. v. Cummins,* 429 U.S. 65 (1976); *Tilton v. Richardson,* 403 U.S. 672 (1971); *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

This case is of substantial importance to the Orthodox Jewish Community because it presents the question of whether a state agency may impede the free exercise of religion guaranteed by the United States Constitution by singling out assembly for religious purposes and according it *less* protection than that accorded to assembly for other purposes. In our view, the special protection given to religion by the Free Exercise Clause mandates that religious speech and assembly be accorded at least the same rights that are granted to other types of speech and assembly.

COLPA believes that the accompanying brief will be of assistance to the Court because it will give this Court the benefit of COLPA's views based on its extensive experience in the area of the First Amendment.

Respectfully submitted,

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TABLE OF CONTENTS

	Page
Interest of the Amicus Curiae	1
Argument	3
Introduction	3
I — A Public Area Made Available for Secular Meetings May Not be Denied for Voluntary Adult Religious Meetings	5
II — Religious Teaching and Religious Worship Are Entitled to Special Protection Under the Free Exercise Clause	7
III — The Establishment Clause Neither Requires Nor Justifies the University's Selective Policy Regarding Religious Meetings	8
Conclusion	14

TABLE OF AUTHORITIES

Cases

	Page
Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3645 (U.S. Feb. 17, 1981) (No. 80-1396)	12
Cantwell v. Connecticut, 310 U.S. 296 (1940)	5
Carey v. Brown, 447 U.S. 455 (1980)	4,5
Engel v. Vitale, 370 U.S. 421 (1962)	11
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	6
Everson v. Board of Education, 330 U.S. 1 (1947)	7
First National Bank v. Bellotti, 435 U.S. 765 (1978)	6
Healy v. James, 408 U.S. 169 (1972)	6
Hudgens v. National Labor Relations Board, 424 U.S. 507 (1976)	6
Jones v. Opelika, 316 U.S. 584 (1942)	7
Lemon v. Kurtzman, 403 U.S. 602 (1971)	11

Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission, 429 U.S. 167 (1976) 6

Martin v. City of Struthers, 319 U.S. 141 (1943) ... 5

Murdock v. Pennsylvania, 319 U.S. 105 (1943) 7

Police Department v. Mosley, 408 U.S. 92 (1972) .. 5,6

Sherbert v. Verner, 374 U.S. 398 (1963) 7

Stone v. Graham, 101 S. Ct. 192 (1980) 12

Thomas v. Review Board, 101 S. Ct. 1425 (1981) .. 4

Tilton v. Richardson, 403 U.S. 672 (1971) 10,11

Walz v. Tax Commission 397 U.S. 664 (1970) 9,10

Wisconsin v. Yoder, 406 U.S. 205 (1972) 7,13

Other Authorities

U.S. Const. Art. VI 12

U.S. Const. Amend. I ..... *passim*

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BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs ("COLPA") is a national organization of attorneys and social scientists organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. COLPA is fully committed to the preservation of constitutional and statutory rights for all

citizens in order that citizens of minority religious faiths, in common with all other citizens, may enjoy the blessings of liberty.

This brief is also joined by the Agudath Israel of America, National Council of Young Israel, Rabbinical Council of America, and Union of Orthodox Jewish Congregations of America.

Agudath Israel of America is a national organization with congregational and individual members with branches in major Jewish population centers throughout the country. The National Council of Young Israel is a coordinating body for more than 185 affiliated Orthodox Jewish synagogues throughout the United States. The Rabbinical Council of America is the largest Orthodox Jewish rabbinical organization in the world with a membership of more than 1000. The Union of Orthodox Jewish Congregations of America is a central spokesman for approximately 1000 Orthodox Jewish congregations in the United States. All of these organizations have a vital concern for the protection of religious liberty.

This case is of substantial importance to the Orthodox Jewish Community because it presents, in stark form, the question of whether voluntary religious activity by a group of adults may be subjected to unique and serious disabilities by a State agency on account of the "neutrality" obligation of the Establishment Clause. Does the Constitution permit a governmental agency to single out religious assembly and accord it *less* privileges and protections than are accorded to similar assembly which is totally secular?

In our view, religion occupies a specially protected place in American society. Those who engage in religious speech and assembly should be entitled to *at least* the rights and safeguards granted to other forms of speech and assembly. To Orthodox Jews, this principle is no theoretical matter. Jewish tradition commands prayer

three times each day and obligates every person to set aside time for daily study of religious law. Observant Jews whose occupations require them to be in and about public buildings must frequently make use of public facilities for brief prayer or study services, which often require the attendance of a *minyan*—a quorum of ten men. The great traditions of this Nation—which afford the widest latitude and safeguard for worship and other peaceful manifestations of religious belief—surely permit public facilities which are customarily available for adult meetings to be used to accommodate such religious duty. The Establishment Clause of the First Amendment is not, we believe, a charter for the suppression of religion. When taken together with the Free Exercise Clause, it puts religious assembly on no less a footing than that occupied by secular assembly.

ARGUMENT

INTRODUCTION

The University of Missouri has determined that in the age-old tradition of academic freedom, it will make the University's facilities available to recognized student groups for meetings, discussions, and other similar events and programs involving the communication of ideas. Although religious student groups are among the more-than-ninety recognized organizations, the University has barred the use of its facilities for "religious worship" and "religious teaching." The question presented by this case is whether "religious worship" and "religious teaching" may be singled out in this manner—*i.e.*, whether adults wishing to engage peacefully in this form of communication may be denied the rights accorded to adults wishing to engage in assembly and communication relating to non-religious subjects.

Two established constitutional principles collide with the University's policy of selectively excluding religious meetings from the access of University facilities granted to all other forms of meetings: *First,* the firmly fixed rule, recently re-emphasized by this Court in *Carey v. Brown,* 447 U.S. 455, 463 n.7 (1980), that "the First and Fourteenth Amendments forbid discrimination in the regulation of expression on the basis of the content of that expression." *Second,* the command of the First Amendment that no governmental agency may interfere with the free exercise of religion, a constitutional directive which, as this Court very recently noted, "by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board,* 101 S.Ct. 1425, 1430 (1981).

The University's sole justification for treating "religious worship" and "religious teaching" differently from secular assembly or secular instruction is that the Establishment Clause of the First Amendment requires or permits it to do so. This assertion is plainly wrong. The Establishment Clause was not designed to burden or disable adults engaged in individual religious worship or teaching. The Establishment Clause prevents government from preferring religion over non-religion and from placing its power and prestige behind one religious faith in preference to another. But if the position of the University in this case is sustained, the Establishment Clause becomes a means of denigrating religion—of reducing its legal status and entitlement below that of any and all other forms of communication. The University's policy would permit use of its buildings for purposes which are totally frivolous and serve no end other than mere entertainment, while denying use of such facilities to totally voluntary assembly and instruction for purposes which have uplifted the human species from the beginnings of recorded history.

I

A PUBLIC AREA MADE AVAILABLE FOR SECULAR MEETINGS MAY NOT BE DENIED FOR VOLUNTARY ADULT RELIGIOUS MEETINGS

This Court has long recognized that conduct protected by the Free Speech Clause of the First Amendment is not removed from that protection because the speech is religious in nature. In *Martin v. City of Struthers,* 319 U.S. 141 (1943), for example, the right to distribute literature door-to-door was upheld under "the federal Constitution's guarantee of free speech and press" when asserted by an individual "espousing a religious cause in which she was interested." 319 U.S. at 141-42. The same principle was applied in *Cantwell v. Connecticut,* 310 U.S. 296 (1940), to the solicitation of funds for religious purposes, 310 U.S. at 303-07, and to the communication of a religious message. *Id.* at 307-11. In reaching these results in *Cantwell,* this Court noted that a State could not, by statute, "wholly deny the right to preach or disseminate religious views," *id.* at 304, and grounded its decision both on the constitutional requirement "that the free exercise of religion be not prohibited" and on the imperative "that freedom to communicate information and opinion be not abridged." *Id.* at 307.

Similarly, it is a well-established constitutional principle that once particular property is made available for public use, the government may not distinguish, on the basis of content, among uses which are otherwise similar in time, place and manner. *See, e.g., Carey v. Brown,* 447 U.S. 455 (1980); *Police Department v. Mosley,* 408 U.S. 92 (1972). As this Court has explained:

> "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department v. Mosley, supra,* at 95.

See also *First National Bank v. Bellotti,* 435 U.S. 765, 785-86 (1978) ("In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue."); *Madison Joint School District No. 8 v. Wisconsin Employment Relations Commission,* 429 U.S. 167, 175-76 (1976); *Hudgens v. National Labor Relations Board,* 424 U.S. 507, 520 (1976); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 209, 215 (1975); *Healy v. James,* 408 U.S. 169 (1972).

The kinds of student meetings which the University of Missouri routinely allows on its premises are similar in time, place and manner to the meetings which have been prohibited to the respondents. The only difference is that the University's challenged regulations prohibit meetings if their *content* is "religious worship" or "religious teaching." The distinction between "secular teaching" and "religious teaching" is as impermissible as a distinction between "conservative teaching" and "liberal teaching" or between "Republican teaching" and "Democratic teaching." The State may not close the doors of its public facilities selectively to "religious teaching" any more than it could to "liberal teaching" or "Republican teaching."

II

RELIGIOUS TEACHING AND RELIGIOUS WORSHIP ARE ENTITLED TO SPECIAL PROTECTION UNDER THE FREE EXERCISE CLAUSE

In a series of cases decided almost forty years ago in which this Court dealt with the subject of religious expression, the Court gave religion a status *higher* than that of ordinary speech. In *Murdock v. Pennsylvania,* 319 U.S. 105 (1943), the Court overruled a decision rendered in the previous Term (*Jones v. Opelika,* 316 U.S. 584 (1942)) and held that religious evangelists could not constitutionally be subjected to the same license tax that applied to commercial distributors of books or other publications. Noting the "preferred position" given to freedom of religion by the First Amendment (319 U.S. at 115), this Court said:

> "The constitutional rights of those spreading their religious beliefs through the spoken and printed word are not to be gauged by standards governing retailers or wholesalers of books." *Id.* at 111.

More recently, in *Wisconsin v. Yoder,* 406 U.S. 205, 215 (1972), this Court reiterated the preferred position of the Free Exercise Clause by stating that "only those interests of the highest order . . . can overbalance legitimate claims to the free exercise of religion." And in *Sherbert v. Verner,* 374 U.S. 398 (1963), the Court recognized that even "indirect 'discouragements' " can place an impermissible "burden on the free exercise of . . . religion." 374 U.S. at 403-04 & n. 5.

The special protection which the Free Exercise Clause of the First Amendment grants to religious expression and religious worship is surely offended by a rule which per-

mits a public facility to be used as a meeting-place by adults for any purpose *except* religious worship or religious instruction. Rather than giving religious belief and practice a "preferred position," such a rule gives religion an ignominiously low status. This Court's decision in the area of Free Exercise do not permit such a result.

III

THE ESTABLISHMENT CLAUSE NEITHER REQUIRES NOR JUSTIFIES THE UNIVERSITY'S SELECTIVE POLICY REGARDING RELIGIOUS MEETINGS

The University justifies its position by claiming that the Establishment Clause of the First Amendment would be violated if student meetings for religious worship or teaching were treated no differently from meetings held for any secular purpose. This claim rests on a misunderstanding of the principles underlying the Establishment Clause.

A. Granting Religious Meetings the Same Access to Public Facilities As Secular Meetings Does Not Constitute "Advancement" or Prohibited "Financial Assistance."

A fundamental misapprehension which pervades petitioners' position is the failure to understand that the only right which is being sought here on behalf of religious meetings is the right of *equality*—the right to be treated no worse and no differently merely because a meeting is religious rather than secular in nature. It is, of course, true that a student group that is treated with the dignity given all student groups by University officials is more likely to attract participants than a group which is given second-

class treatment. The University argues that it would be "advancing" religion if it permitted the respondents to conduct their meetings on campus because students would then "feel comfortable" coming to the meeting and would not think there is "something wrong" with the group (Pet. Br. 17-19).

If carried to its logical extreme, this argument means that any government agency which does not prohibit religious worship is "advancing" religion. Obviously, if religious worship is as lawful as any other activity, participants will "feel comfortable" during such worship and will not think there is "something wrong" with the religious service. It is ludicrous, however, to suggest that the Establishment Clause requires that religion be prohibited because the absence of a prohibition will "advance" or "encourage" religion more than if it is forbidden. Indeed, as this Court made clear in *Walz v. Tax Commission,* 397 U.S. 664, 669 (1970), "rigidity [in the application of the Religion Clauses of the First Amendment] could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited." Rather, what is required is "a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Id.* That is all that respondents here ask.

The same analysis demonstrates the fallacy of the "financial assistance" argument made by the petitioners (Pet. Br. 19-22). Of course, public expenditures are involved in maintaining public buildings. In a strictly logical sense, some of those expenditures are attributable to religion if religious meetings are held, along with all other meetings, in such public buildings.

By the same token, public moneys are being spent for religious purposes when a church is within a fire station's zone of coverage, or within a particular police precinct, or

within a sewage district. Yet the Establishment Clause is not violated if the church receives only an *equal* share of the services made available to the general public.

This was the precise holding of this Court in *Walz v. Tax Commission, supra.* There, the Court upheld the constitutional validity of tax exemptions granted to religious organizations. Quoting from the landmark decision in *Everson v. Board of Education,* 330 U.S. 1 (1947), where the Court ruled that a state may pay for the transportation of children to parochial schools, Chief Justice Burger reasoned:

> "Surely, bus transportation and police protection to pupils who receive religious instruction 'aid' that particular religion ... . [I]f . . . buses can be provided to carry and policemen to protect church school pupils, we fail to see how a broader range of police protection given equally to all churches, along with nonprofit hospitals, art galleries, and libraries receiving the same tax exemption, is different for purposes of the religion clauses." 397 U.S. at 671.

Rather, the Court concluded, the provision of such services did not violate the Establishment Clause because they "are no more than incidental benefits accorded all persons or institutions within a State's boundaries." *Id.* at 676. Here, too, if religious groups are permitted to use the University's facilities on terms equal to, and no better than, those offered to the public at large, there is no impermissible aid to religion.* The issue is, as this Court

* The language in *Tilton v. Richardson,* 403 U.S. 672, 679-80 (1971), which refers to use of college facilities "for religious instruction, training, or worship" relates to the total dedication of a facility, or a portion thereof, for religious purposes. If a University were to set aside one wing of a building for a chapel or for a religious-instruction classroom, the language of *Tilton* would come into play. The present case involves the use of ordinary facilities—available for many other purposes—for occasional religious meetings.

observed in *Tilton v. Richardson,* 403 U.S. 672, 679 (1971), "not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion."

The Establishment Clause was not designed to destroy religion in this country or to place it or its adherents at a permanent disadvantage. It was added to the Constitution, as this Court has noted, "to stand as a guarantee that neither the power nor the prestige of the . . . Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office." *Engel v. Vitale,* 370 U.S. 421, 429-30 (1962). The situation presented by this case is a far cry from that which gave rise to the fears expressed and forestalled by the Founding Fathers.

B. Rules Applicable to Elementary and Secondary Schools Do Not Apply to Colleges.

A second factor which distinguishes this case from many of those cited by the petitioners is the age of the individuals involved. This is not a case involving religious worship or a religious ceremony in a primary or secondary public school. Because children of primary and secondary-school age are particularly impressionable and it is difficult to distinguish between coerced and voluntary participation in pre-college activities, this Court has been particularly sensitive to Establishment Clause cases involving primary and secondary schools. *See, e.g., Lemon v. Kurtzman,* 403 U.S. 602 (1971). But, as the Court noted in *Tilton v. Richardson,* 403 U.S. 672, 686 (1971):

> "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view ... . "

This case, therefore, does not present any serious question as to the "voluntary" character of the worship or instruction undertaken by the respondents. *Compare Brandon v. Board of Education,* 635 F.2d 971 (2d Cir. 1980), *petition for cert. filed,* 49 U.S.L.W. 3645 (U.S. Feb. 17, 1981) (No. 80-1396). Nor does it involve a governmental agency propagating to youngsters of impressionable age doctrines of religious faith. *Compare Stone v. Graham,* 101 S. Ct. 192 (1980). The question here is whether college-age students, who voluntarily wish to meet occasionally for religious worship in a public facility which is available for secular meetings, shall be forbidden from doing so because of a restriction allegedly based on the Establishment Clause. No decision interpreting that Clause and no constitutional principle derived from it justifies such a result.

C. Missouri's Constitutional Principle of Separation Does Not Justify Discrimination Against Religion.

Petitioner's final argument is that, irrespective of the *federal* constitutional rule, the University is justified in impeding the free exercise of religion because of Missouri's strong policy of separating church and state (Pet. Br. 32-42). This argument is patently unsound.

It is plain, we submit, that a State cannot override a federal constitutional liberty by asserting that its own constitution or laws contain provisions which diminish the federal right. The Supremacy Clause of the Constitution, which declares in Article VI that the United States Constitution "shall be the supreme law of the land," precludes

any such result. Individual liberties guaranteed by the Free Exercise Clause cannot be different in each State of the Union depending on how heavily each State wishes to emphasize its own concept of "separation." Religious conduct or expression protected by the Free Exercise Clause in New York or in Kansas must also be protected by the Free Exercise Clause in Missouri. The Federal Constitution is not a patchwork quilt of multi-hued liberties.

One can readily conceive the injustice and uncertainty that would result from the adoption of the kind of rule urged by petitioners. Could the State of Illinois deny unemployment compensation benefits to an individual in the position of the petitioner in the recently decided case of *Thomas v. Review Board,* 101 S. Ct. 1425 (1981), if its constitution or laws contained a very strong policy requiring the State's inhabitants to find work rather than receive unemployment benefits? Could the State of Idaho force an Amish child to attend a regular school to the end of high school notwithstanding *Wisconsin v. Yoder,* 406 U.S. 205 (1972), if it claimed that a "compelling interest" is expressed in its constitution and laws to educate all its children to the end of the high school years? Such arguments would receive their deserved short shrift. Missouri's is entitled to no more.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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